No. 11963

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

HERBERT A. JONES, JR.,
Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

This is a suit in equity by the United States in an attempt to set aside a sale made by the War Assets Administration on the ground of (1) mutual mistake, (2) unilateral mistake, (3) lack of authority by government agents negotiating the sale, and (4) sale at an unfair price in violation of the Surplus Property Act (Gvt. Br. 7 and R. 20-27).

As stated below, there was ample evidence to support the findings by the trial court that there was no mistake, either mutual or unilateral (R. 35), and also to support the finding that the sale was authorized and that defendant acted in good faith; that he paid value for his

purchase and that the actual value of the goods was recognized by both parties to be wholly speculative (R. 35). Thus, as pointed out below, the sale cannot be set aside on the ground of mistake. Nor can it be set aside on the ground of lack of authority or invalidity, particularly in view of the terms of section 25 of the Surplus Property Act of 1944, 50 U.S.C.A. Sec. 1634, which specifically provides that documents of title, such as were delivered to defendant, shall be *conclusive* evidence of compliance with provisions of that Act as to any bona fide purchaser for value, which defendant clearly was under the above findings. In addition, as pointed out below, there are other equitable considerations in this case which bar the Government from relief. (See Findings of Fact, R. 34-37).

STATEMENT OF THE CASE

1. *Absence of Mistake or Lack of Authority by War Assets Administration.*

The Government offered evidence that the original cost to the government of the goods involved in this case exceeded $60,000.00 (R. 56; Plf. Ex. 2) and places great reliance on that fact in view of their subsequent sale to defendant for $75.00 (Gvt. Br. 18-19).

It is further admitted that, in accordance with customary practice, the War Assets Administration listed these goods, together with certain other goods, in a so-called special offering inviting bids, which accurately and completely described the goods and which was sent to 4723 dealers, including the dealers in hardware, heavy machinery, and *dealers in scrap metals* (i.e., junk

yards,) in the Portland area. (See Admitted Facts in Pre-trial Order, Gvt. Br. 45-46; Plf. Ex. 1; Dft. Ex. 9; see also R. 7-15, which duplicates Plf. Ex. 1, and R. 87, 96, 187.)

Although bids were received and accepted on various items in this special offering, no bids were received on other items, including the goods in controversy, even from scrap metals dealers (P. T. Order, Gvt. Br. 45-46; R. 72, 81, 96, 204). It appears from the deposition of the Government's witnesses and from their testimony at the trial that Williams, the chairman of the W. A. A. Committee on Bids and Awards and who had authority to sell goods costing up to $100,000.00 (R. 61, 119-120), ordered that this residue be offered for sale as a single lot at the best price that could be negotiated (R. 73, 119, 215-216, 235).

It appears from the testimony of defendant Jones that this residue was first offered for sale at a price between $900.00 and $1000.00; that a few days later, when no offers were received, this price was lowered to $250.00; and that on the day of the sale in question these goods were offered for sale by the War Assets Administration for $75.00 (R. 127, 128, 131, 144, 148). Government witnesses simply "did not remember" (R. 90, 97, 199).

It is admitted that during all this time W. A. A. and its agents had complete and accurate information as to the original cost of such goods (P. T. Order, Gvt. Br. 44-45; Plf. Ex. 2 and 3; R. 92). It also appears from

evidence offered on behalf of defendant that W. A. A. was not only under directions to get the highest possible prices but also to get rid of war surplus goods as rapidly as possible (see 50 U.S.C.A. Sec. 1611(r)); that war surplus goods were often offered at bargain prices in order to move them fast (R. 166-168), and that, accordingly, it was customary, after goods had been offered for bid and no bids received, to offer such goods at a negotiated price and to accept the best price offered, even though but a small fraction of the original cost to the Government (R. 78, 89, 119, 126, 166-168; see also Dft. Ex. 13, p. 38); that sales had been made to other dealers at prices as low as one-half of one per cent of the original cost (R. 166-168); and that this was particularly true where, as here, the goods involved were made for a special purpose for the Government and would have no general use or market (Id.). In this connection, it is significant to note that the Government, although denying all such evidence of custom, failed to produce figures on original costs and sales prices of goods sold to the "Big 4" scrap dealers in the Portland area, on excuse that all such records were in Washington, D. C., or "are in the files but sealed for shipment to San Francisco" (R. 162).

It was also admitted that all possible efforts to sell these goods at a higher price had been exhausted and that there was nothing further that could have been done to secure a higher price (R. 89, 205); that the program of sale would not have been changed even if they fully realized what they were selling (R. 88, 205), and that this particular sale was fully in accord with

W. A. A. custom and practice, as established in other sales (R. 78, 89). Finally, at the trial of the case it was agreed that the issue of mistake was "out the window and that the only issues were (1) lack of authority and (2) good faith by Jones (R. 103, 105).

After the sale was made to Jones for $75.00, the sales documents were approved by Zannon, who had authority to make sales of goods costing up to $100,000.00 (R. 60, 203, 231, 135). Zannon attempted to claim mistake by the fact that the documents indicated that the sale was on a bid basis and had been already approved by the Committee on Awards (R. 111, 232), but there was testimony by other government employees that this reference indicated no more than that the *original* program for the sale of the goods was on a bid basis (R. 75, 80, 91); that when a residue remained after a bid sale, it was sold on a negotiated basis (R. 81-82, 91-92, 215); that this sale was in accord with usual practice (R. 78, 89), and that the sale had already been authorized by Williams, Chairman of the Committee on Awards (R. 73, 215, 235).

It is thus clear that there was substantial evidence to support the finding by the trial judge that the sale at $75.00 was "authorized by an agent of the War Assets Administration" (R. 36), as well as the finding that there was no mistake by the Government or its agents as to the identity, nature or value of the gear joints that determined their conduct in making the sale to Jones (R. 36).

2. *Good Faith and Absence of Mistake by Defendant.*

At the time of the sale in question, according to Jones' uncontradicted testimony, he was aware of the general practice of W. A. A. of selling goods which had not been sold for higher prices at any price which would enable it to get rid of the goods, even though a small fraction of the original cost to the Government. He had heard many of the rumors which we have all heard concerning specific sales by the War Assets Administration at unbelievably low prices (R. 126; see also R. 166-168).

With this information, Jones went to see the representatives of the War Assets Administration. He was first referred to Webb, who told him that it would be necessary to buy the entire lot; that it was for sale for $75.00, and showed him the description of each item, as included in the special offering—admittedly a complete and accurate description of the goods (R. 129, 155, 67, 221, 7-15; Plf. Ex. 1). Webb testified Jones was principally interested in jeep engines and asked what he could do with the "junk", but admitted that the discussion of what was meant by "junk" was limited to two Chess wagons, admittedly of little present value, and that there was no discussion of the Universal gear joints (R. 68, 74, 221). He did not claim that Jones made any misrepresentations whatever, could remember nothing further of the conversation, and admitted that he had no reason to doubt Jones' good faith (R. 74, 222).

Webb then referred Jones to Burgoyne, who was in charge of the division (R. 70, 220). Jones testified that Burgoyne gave him a sales talk and told him that it was a "good buy" (R. 131); that he was told that it was a residue remaining after an offering for bids and that no bids were received, although the offering was sent to scrap metal dealers, among others (R. 129); that the residue had been on hand for some time, and that the War Assets Administration was anxious to get rid of it (R. 131); that Burgoyne also showed him the list describing the goods and told him where he might be able to sell some of the items (R. 130-131); that he was informed that the gear joints were at Oregon Shipyards and might be sold to some shipyard still operating in the East (R. 131, 152; see also corroboration by Anderson, R. 155-156, and see R. 200). Burgoyne testified that he could remember nothing of the conversation with Jones, but did not attempt to contradict Jones' version of the affair or to claim that he made any misrepresentations (R. 90, 199).

Jones, who had previously worked in a shipyard, as fully known by the government agents (R. 74), testified that he knew what Universal gear joints were (R. 129); that he did not know whether he could sell them for anything other than for scrap (R. 130); that if sold as scrap it would be necessary for each joint to be taken apart to separate the bronze from the steel (R. 153; see also testimony by Burgoyne, R. 94-95); and that since he knew that the junk dealers had made no bids (R. 129), his best estimate was that while their value might be substantial, it was wholly speculative, depend-

ing upon what he could get out of them (R. 129, 146). He also testified, without contradiction, that he did not learn of their original cost to the Government or of their weight, for purposes of scrap, until later (R. 134-135, 146, 152-153). Some government witnesses were also unable to place any definite value on these goods (Dft. Ex. 13, p. 32; see also R. 85 and Dft. Ex. 12, Answer by Government, paragraph VIII).

Acting upon the basis of this information and belief, Jones then told Burgoyne that he would take the goods at the figure of $75.00, placed on them by W. A. A., and gave Burgoyne a check for that amount (R. 131-132). He also testified that Burgoyne then took the papers to Zannon (who had authority to make sales up to $100,000.00 R. 60) for approval, and then told Jones that a receipt and other papers would be mailed to him (R. 132).

A few days later Jones received in the mail a receipt for his check (Dft. Ex. 10) and the sales documents (Dft. Ex. 11), which purported, among other things, to warrant that the government agents had the right to sell the goods. It should also be noted that these sales documents state clearly that all items "constitute one complete lot at total selling price of $75.00" (Id.).

Jones testified further, without contradiction, that a few days later he started taking delivery of the goods, which were scattered at various locations, and that when he went to Oregon Shipyard on about November 12, 1946, he was given delivery of some of the goods at that location, but was told that the gear joints had been

"tied up" (R. 132-134). On the next day he returned, but the custodian, Gibson, refused to see him for about three hours and then, when Jones persisted, told him that the U. S. Maritime Commission had withdrawn the gear joints, that something was wrong with the sale and that the gear joints originally cost the Government over $60,000.00, weighed about 24½ tons and had a scrap value of $2,000.00, which was the first notice to Jones of their original cost and weight (R. 134-135, 146, 154; see also Plf. Ex. 13, Dep. of Gibson, pp. 36-39). Jones then went to the War Assets Administration and was referred to Zannon, who also told him that he could do nothing about the matter (R. 135-136). He then went to the U. S. District Attorney's office, where he told his story to Mr. Victor Harr, who later tried the case against Jones (R. 137, 50). He then engaged private counsel.

By letter dated December 4, 1946, Mr. C. T. Mudge, W. A. A. Regional Director, after receiving complete information in the matter, as stated in that letter, wrote to defendant's counsel and gave reasons for refusing delivery of the gear joints, but made no claim of bad faith by Jones (Dft. Ex. 18). Again, on deposition taken several months later, *Mudge stated that he had no reason to doubt the good faith of Jones* (see Dft. Ex. 13, p. 12; see also R. 161). No claim of bad faith was made by the U. S. District Attorney in representing Mudge in answer to the complaint for replevin filed by Jones in the State Court, although Mr. Harr, who appeared in that case, had the entire story from Jones himself (see Dft. Ex. 12). Nor was any such claim made in the

original complaint filed by the Government in this case (Dft. Ex. 23). It was not until the amended complaint of the Government, filed on December 4, 1947, less than three weeks before trial, that the Government made any charge of bad faith.

It is thus clear from the foregoing testimony both that the Government has wholly failed to sustain its burden of proving that Jones was either mistaken or was other than a bona fide purchaser for value, and, in addition, that the whole contention of bad faith was no more than an after-thought upon realizing the conclusiveness of title to war surplus property sold by the W. A. A. to bona fide purchasers, in view of the provisions of 50 U.S.C.A. Sec. 1634. It is further clear from the foregoing that there was ample evidence to support findings by the trial judge that Jones did not act under mistake and that he acted in complete good faith, without knowledge or reason to know of any mistake or lack of authority on the part of the Government (R. 35).

3. *Conduct of Government after Sale—Pleadings in this Case.*

After further unsuccessful attempts to secure delivery of the gear joints, Jones filed, on December 28, 1946, a suit for replevin in the State Court against C. T. Mudge, War Assets Administration Regional Director, and D. M. Gibson, Custodian at Oregon Shipyard (see Dft. Ex. 12, Complaint). Almost immediately thereafter, the gear joints were moved to the Vancouver Shipyard, out of the jurisdiction of the Oregon Court (Dft. Ex. 12, Amended Complaint, par. I, and Answer,

par. I). Upon discovery that the goods were under the custody of J. M. Buffett, a resident of Oregon, and on joining him as a party defendant, the goods were again moved to the U. S. Army Reservation at Vancouver, Washington (Dft. Ex. 13, Deposition of Buffett). Jones then secured a restraining order from the United States District Court for the Western District of Washington, to prevent further movement of the goods (R. 175).

On September 26, 1947, nearly eleven months after the sale, the Government filed in this Court a suit to rescind the sale as to the gear joints alone, alleging as the sole grounds: (1) Withdrawal by the U. S. Maritime Commission, (2) mistake by the Government in assuming that the gear joints were automotive equipment, and (3) mutual mistake as to the nature and value of the gear joints, resulting in a gross inequity (R. 2-6). Tender was made into Court of $69.13, the portion of the total price attributable to the gear joints (Id.). Later, it was admitted that the U. S. Maritime Commission had never withdrawn the goods from sale (R. 162), and the issue of mistake was abandoned (R. 103, 105).

After filing of defendant's answer and the setting of the case for pre-trial conference, the Government, on December 4, 1947, less than three weeks before trial, filed an amended complaint adding, as further grounds for rescission: (1) That Jones made misrepresentations to W. A. A., (2) that the sale was void as beyond authority of W. A. A., and (3) that the sale was void as in violation of the Surplus Property Act, in that the price was unfair and inadequate (R. 20-27). Even then the

Government did not ask that the sale be rescinded as a whole but only as to Lots Nos. 27, 28, 29 and 30, consisting of the gear joints (R. 24, par. 10; R. 26).

It was not until preparation of the final draft of the pre-trial order, less than four days before trial, and nearly fourteen months after the sale, that the Government took any positive action to attempt the rescission of the sale as a whole, including items other than the gear joints. Even then it was conceded that the Government had "at all times retained the proceeds from the purported sale of the following delivered items purportedly sold to defendant at the time and under the circumstances hereinabove set forth: One dump truck body (item 1), 12 brass plug coils (item 2), 2 jeep motors (item 3), 104 King pins for trailer hitches (item 23), 3 Norgren lubricators (item 24), 3 spare parts for circulating pumps (item 25), 240 miter gears (item 26), and two chess wagons (items 31 and 32)" (Gvt. Br. 47-48). No attempt was made by the Government to regain possession of these goods or to tender back the purchase price of such goods (R. 152). Moreover, as the Government concedes, the pre-trial order was never signed (R. 50). In fact, as counsel will admit, the trial judge refused to sign it. Thus, the pre-trial order has no force and effect, except for the admissions of fact contained therein, and the case must be considered as submitted on the issues made up by the pleadings, subject to concessions made at the time of trial (R. 103, 105).

APPELLANT'S SPECIFICATIONS OF ERROR ARE INSUFFICIENT

As this Court well knows, Rule 20, Section 2 (d) of its Rules, requires that all briefs by appellants shall contain specifications of error which "shall set out separately and particularly each error intended to be urged," and that "when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

The original brief filed by appellant herein contained no specifications of error whatever. Thereupon the Clerk of this Court notified appellant that "your brief does not contain a specification relied upon as required by Subdivision 2(d) of Rule 20", and requested that appellant "have printed inserts for placing in your brief" (see letter, Appendix "A").

Thereupon appellant printed, served and filed what purports to be a "Specification of Errors," but which clearly fails to satisfy the requirements of Rule 20, in that the purported specification neither states with "particularity" each error alleged, nor states "wherein the findings of fact and conclusions of law are alleged to be erroneous". This is at once apparent from a mere reference to the form of appellant's purported "specification of errors".

This Court has established the rule that briefs should strictly follow the requirements of Rule 20 (2) (d) with reference to specifications or assignments of error.

O'Brien, Manual of Federal Appellate Procedure (3rd Ed.) p. 211, and *Supplement No. 4,* p. 132, and cases cited therein. See also *Cyclopedia of Federal Procedure* (2nd Ed.) Vol. 12, pp. 17, 18, 19, 181, 182. In particular, see *United States v. Shingle* (C.C.A. 9th) 91 F.(2d) 85; *Gripton v. Richardson,* C.C.A. 9th 82 F. (2d) 313; *United States v. Cushman* (C.C.A. 9th) 136 F. (2d) 815, cert. den., 320 U. S. 786; *Peck v. Shell Oil Co.* (C. C.A. 9th), 142 F. (2d) 141, and *Conway v. United States* (C.C.A. 9th) 142 F. (2d) 202. See also *E. R. Squibb & Sons v. Mallinckrodt Chemical Works* (C.C.A. 8th), 69 F. (2) 685; *Butler v. United States* (C.C.A. 8th), 108 F. (2d) 27; *Cohen v. United States* (C.C.A. 8th), 142 F. (2d) 861), *and Fleming v. Munsingwear* (C.C.A. 8th), 162 F. (2d) 125.

Further reasons for the inadequacy of each particular specification are stated below in connection with answering the argument set forth in appellant's brief, but by proceeding to an argument on the merits appellee is not to be considered as having waived his objections to the purported specifications of error. Nor are such objections to be considered as waived by the filing of this brief or by the failure to file a motion to dismiss upon such grounds, since it appears from Rule 20 (7) that when appellant's brief is not in required form, such a matter is to be called to the attention of the Court by its Clerk and set down for hearing and that only when an appellant is "otherwise" in default is the matter to be raised by appellee by a motion to dismiss. See also *O'Brien,* supra, p. 206.

SUMMARY OF ARGUMENT ON MERITS

I. SALE WAS NOT VOID FOR LACK OF AUTHORITY OR BECAUSE OF INADEQUATE PRICE.

A. Appellant's Argument Improper because Not Based on Proper Specifications of Error and Raised Too Late in Proceedings.

B. Findings of Fact that Sale Was a Valid Sale and Was Authorized by Agent of WAA Are Conclusive and, at least, Are Not "Clearly Erroneous."

C. Appellee Was a Bona Fide Purchaser for Value and under the Surplus Property Act his Title Is Therefore Conclusive and Can Not Be Set Aside.

1. Bill of Sale to Jones Satisfied Requirements of Surplus Property Act.
2. Jones was a Bona Fide Purchaser for Value under the Act.

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II. NO MATERIAL MISTAKE MADE BY GOVERNMENT AGENTS.

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VI. FINDINGS OF FACT CONCLUSIVE AND NOT "CLEARLY ERRONEOUS."

ARGUMENT ON THE MERITS

I. SALE NOT VOID FOR LACK OF AUTHORITY OR BECAUSE OF INADEQUATE PRICE.

Appellant first argues that the sale of the Universal gear joints was void ab initio, first, because the W. A. A. agents were without authority to make the sale, and, second, because the sale was at an inadequate price (Gvt. Br. 16-19).

A. *Appellant's Argument improper because not based on proper specification of error and raised too late in proceedings.*

Appellant's specifications of error will be searched in vain for any specification either directly bearing on this point or giving this point as a reason in support of any specification, both as required by Rule 20. Clearly specifications 1, 2, 3, 7, 8 and 10 refer to other points argued by appellant and will be considered later (see Argument on Points III, IV and V). Specification 4 is clearly inadequate for any purpose (cf. *United States v. Cushman,* supra). Specifications 5 and 9, in referring to rescission of the sale, assume that title passed and that the sale was not void ab initio and therefore have no bearing on this point. This leaves only specification 6, which complains of the holding by the trial court that the transaction constituted a valid sale. But this specification is defective in not stating any reason why such a holding was in error, as required under Rule

20. Therefore, this point should not be considered by this Court for lack of a proper or any specification of error.

Moreover, the claim that the sale was invalid, either for lack of proper authorization or approval, or as contrary to the policy of the Surplus Property Act, was not raised in the original complaint in this case (R. 2-6) or otherwise until the filing of the amended complaint, filed over two months later, over fourteen months after the sale and less than three weeks before trial (R. 20-27). The original complaint was based solely on a theory of mistake. As held in *Railway Co. v. McCarthy,* 96 U.S. 258, 267:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

Thus the Court held that where the illegality of a contract was not raised before, it was "an afterthought, suggested by the pressure and exigencies of the case" and could not be raised later.

Finally, appellant cannot now claim that the sale was void "ab initio" for the reason that at the time of trial, although elsewhere contending that the sale was not authorized, appellant admitted that, in view of the provisions of the Surplus Property Act, when, as here, the sales documents were executed and delivered "probably title has passed, but we contend that he was not a bona

fide purchaser'' (R. 100). Under this admission, it was conceded that title passed and now rests in appellee. Therefore, even if appellee's contentions, based upon failure by appellant to raise this issue in a proper or timely manner, are overruled, the only question is whether the sale is voidable, not whether it was void ''ab initio''.

If, however, this Court desires to consider the merits of this issue, and without waiving this point, appellee submits the following argument on the merits.

B. *Findings of Fact that Sale was a valid Sale and was authorized by Agent of W.A.A. are Conclusive and, at least, are not ''Clearly Erroneous.''*

The entire basis of the findings of fact by the trial court is that the sale was a valid sale. Thus, the findings refer to ''said sale,'' without qualification, at least eight times (R. 35, 36, 37). The trial court also found that ''Said War Assets Administration * * * issued directions that this residue be placed on sale at the best price offered * * *'' (R. 34), and, later, that ''Said sale at said price was then authorized by an agent of the War Assets Administration'' (R. 35-36).

Neither by designation of the points upon which appellant intended to rely nor by specification of error has appellant attacked the findings of fact made by the trial court. Therefore, appellant cannot now complain as to any finding of fact or as to the sufficiency of the evidence to support any such finding. *Cohen v. United States,* supra.

But if this Court should desire to consider whether such findings are "clearly erroneous"—the test to be applied where the question has been properly raised—it is submitted that the record in this case supports the findings. Appellant relies on the fact that the "uncontradicted evidence shows that Mudge alone had authority to make such a sale and that the delegation of authority was limited to sales on a bid or fixed price basis" (Gvt. Br. 16). The only references therein, however, were to the testimony of the agents themselves, and this testimony, far from being conclusive, was conflicting. The only written evidence on extent of authority was War Assets Administration Bulletin No. 80, which, as we recall, did not restrict the maximum limitations stated therein by reference to bid or fixed price sales (Dft. Ex. 5). Mudge originally testified that there was no question as to lack of authority to make the sale (Dft. Ex. 13, p. 11; see also R. 160, 161). Burgoyne testified that the sale was authorized by Zannon (R. 203), who was described by Givens as one of those having authority to approve sales up to $100,000.00, without qualification as to type of sale (R. 61). Zannon's attempted claim of misunderstanding that when he signed the sales documents he thought it was a bid sale from the marking on the documents was contradicted by the testimony of Webb (R. 75, 80) and is subject to disbelief by the trial judge (see supra, p. 5). Moreover, there was testimony that Williams, as head of the Committee on Bids and Awards (and with authority up to $100,000.00, R. 61), had authorized that the sale of the undisposed residue in question be made at the best price that could be negotiated (R. 216; see also R. 73, 215, 235). No testi-

money was offered by the Government to show that Williams did not have approval of his committee, or that such approval was necessary, and it is admitted that no other offers were received by the Government; that the goods were on hand for several days and that there was considerable negotiating before the price of $75.00 was accepted by Jones (Gvt. Br. 45-46). Thus there was sufficient testimony to sustain the findings that the sale was properly authorized and was not void for lack of authority and, at least, such a finding was not "clearly erroneous" under such a record. (See also, supra, pp. 4, 5.)

C. *Appellee was a Bona Fide Purchaser for Value and under the Surplus Property Act his Title is therefore Conclusive and cannot be set Aside.*

Although appellee strongly denies that the sale in question was either void or voidable for excess or absence of proper authority, appellee next contends that any such lack of authority is wholly immaterial in this case by reason of the terms of section 25 of the Surplus Property Act, 50 U.S.C.A., appendix, sec. 1634, as follows:

> "*Conclusiveness of Title of Purchaser.* A deed, *bill of sale,* lease, or other instrument executed by or on behalf of any Government agency *purporting to transfer title* or any other interest in property under this Act shall be *conclusive evidence* of compliance with the provisions of this Act insofar as title or other interest of any *bona fide purchasers* for value, or lessees, as the case may be, is concerned."

Both in the pleadings and at the trial defendant took the position that documents purporting to transfer title were delivered to him; that he was a bona fide purchaser and that under this statute his title was therefore conclusive and could not be set aside (R. 31, 99, 106; Dft. Ex. 11). Since this was such a basic issue in the case it is difficult to understand why the Government has failed to discuss the issue in its brief, unless it hopes to gain advantage by forcing appellee to make the opening argument on this issue in order that the Government can then reply, without any opportunity to appellee to answer the Government position on this issue, whatever it may be. This is a further reason why the Government appeal should be dismissed for failure to comply with the rule relating to specifications of error, since the specifications in this case give appelee no inkling of the Government position on appeal on this vital issue.

Moreover, the findings of fact by the trial court, not attacked by a proper or any specification of error, found as follows:

> " * * * nor did defendant have any knowledge or reason to know that plaintiff or its agents made any such mistake or lacked authority to make said sales. No representation or fraudulent act or inducement, either actual or constructive, was made or engaged in by defendant and defendant acted in good faith at all times. Nor is there any evidence that plaintiff or its agents were misled by defendant in any way from any act, inducement or representation by defendant and there was no concealment of facts or imposition." (R. 35).

and, further, that:

> "On said date defendant accepted said offer and tendered and paid the sum of $75 to plaintiff, which said tender was accepted. *** Thereafter, on November 6th, 1946, a bill of sale was executed and delivered to defendant by and on behalf of said War Assets Administration purporting to transfer title of all items of personal property, including said universal gear joints, to defendant and warranting that plaintiff and its agents had the right to sell said goods to defendant." (R. 35-36).

Appellant has conceded that title passed with the execution and delivery of the bill of sale to Jones (R. 100), subject only to being set aside if the sale was not authorized or if Jones was not a bona fide purchaser. It is submitted, however, that, regardless of this concession, the above findings completely satisfy the requirements of Section 1634 of the Surplus Property Act, supra, by establishing its two requirements: (1) That a "bill of sale" was "executed by or on behalf of" the War Assets Administration "purporting to transfer title" to Jones; (2) that Jones was a "bona fide purchaser for value". It follows that this bill of sale must be accepted as conclusive evidence of compliance with provisions of the Act. Thus there can be no contention that the sale was invalid as not being authorized by the Act or by regulations or other delegations of authority thereunder, or that the sale was otherwise upon terms violating the provisions or policies of the Act. By the terms of the Act and under the findings of fact in this case, the bill of sale is "conclusive".

Apparently, however, appellant still takes the position that in spite of this Act and these findings of fact that, (1) there was no proper bill of sale within the meaning of the Act; and, (2) that Jones was not a bona fide purchaser. (See Gvt. Br. 17 and R. 107).

1. Bill of Sale to Jones Satisfied Requirements of Act.

Section 25 of the Surplus Property Act (50 U.S.C.A. App. Sec. 1634) refers to a "bill of sale * * * executed by *or on behalf of* any government agency *purporting* to transfer title * * * *shall be conclusive evidence of compliance with the provisions of this Act* * * *".

We submit that nothing could be more clear. The words "on behalf" and "purporting" clearly show an intent that title is transferred by a bill of sale whenever executed "on behalf" of W. A. A., even though by an agent who had no authority and therefore could only "purport" to transfer title. Any doubt that such was the intent of Congress is removed by the further provision that such a document shall be "conclusive".

That such must have been the intent of Congress also appears to be clear from the circumstances giving rise to the Surplus Property Act and the problems to be dealt with under its provisions. When the Act was enacted in the fall of 1944 the end of the War was in sight and the stage was being set for the greatest forced sale in history. Huge quantities of war surplus commodities had been accumulated, ranging from shoelaces to B-29 bombers. The Government was naturally

anxious to escape the tremendous burden of storing and maintaining these surplus stocks. Thus the policy was not to hold for the last possible penny and to withhold sales documents until the contracts and documents of title for all of the billions of items could be examined and approved by government auditors and attorneys, as in the usual course of government transactions, but, as stated in the Act, to dispose of this huge surplus "as promptly as feasible" (50 U. S. C. A. App. Sec. 1611(r)).

Since much of the goods involved had considerable value and in order to protect the purchasers of such goods at sales conducted in such haste in their titles from the possibility that after a sale was consummated some government auditor or attorney might find some technical defect or lack of proper authorization or approval, and in order to prevent the uncertainty, confusion and consternation that would naturally be the result in such an event, it was both natural and reasonable that a provision such as Section 25 was included in the Act. As held by the Supreme Court of the United States in *Muschany v. United States,* 324 U. S. 49, 66:

> "It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated."

It thus appears that Section 25 of this Act was intended to apply to just such situations as involved in this case, where a bill of sale is executed and delivered and appears to be regular on its face but where the Government later contends that there was some mistake or lack of authority in its execution.

An examination of the bill of sale in this case shows on its face that it was not only signed on behalf of W. A. A. and purported to transfer title but that it warranted the right of W. A. A. to transfer title (Dft. Ex. 11). Thus it clearly satisfied the requirements of Section 25. Indeed, if all bills of sales to war surplus goods could be set aside on such grounds, Section 25 would be stripped of all meaning and rendered a complete nullity. Therefore, the only way to give it any meaning or effect is to hold that it was intended to protect bona fide purchasers to whom documents of title appearing regular on their face have been delivered by the Government, even though there was some mistake or lack of authority in the execution of such documents.

Although it is thus appellee's position that the terms of Section 25 are clear and unambiguous and require no reference to legislative history as an aid to interpretation, it is submitted that any doubts that in enacting this provision Congress had the intent set forth above are at once set to rest by reference to House Report No. 1757, 78th Congress, 2nd Session, p. 17, where the following statement of legislative intent is made:

> "Section 10(a) of the committee amendment authorizes any agency disposing of property under the act to do so, subject to the other provisions of the act, by sale, exchange, lease, transfer, or other disposition for cash, credit, other property or otherwise, with or without warranty, and upon such other terms and conditions as the agency deems proper. Section 10(d), (Section 25 of the final draft), makes any instrument, executed by or on behalf of an agency, purporting to transfer title to property under the act, conclusive evidence of com-

pliance with the provisions of the act, insofar as the title of any bona fide purchasers is concerned. *These two provisions are designed clearly to assure to purchasers that agencies selling property of the Government have full authority to do so,* and that the purchaser's title cannot be invalidated *because of any failure of a Government agency to comply with a requirement of the act.* These enabling provisions clarify the law on the subject, and the committee considers them of major importance."

2. Jones Was a Bona Fide Purchaser for Value.

Apparently the Government may also take the position that Jones was not a bona fide purchaser for value upon the grounds that he was put on notice of mistake or lack of authority by the apparent disparity between the actual value and the selling price of the goods and that he was bound by law to take notice of any limitations on the authority of the government agency with which he dealt.

As to any claim of apparent disparity between actual value and selling price sufficient to put on notice of mistake or lack of authority, it is submitted that any such claim is at once put to rest by the following finding of the trial judge:

"There is no substantial evidence to establish the value of said items at the time of said sale other than that the value of said items, and in particular of said universal gear joints, was substantial, but that the exact value of said goods was questionable and speculative, which said facts were recognized both by plaintiff, its agent and defendant and all

> of said negotiations, including the determination of said price and their subsequent sale, were the deliberate and intentional acts of plaintiff, its agents, and defendant, * * * ". (R. 35-36).

Since appellant has not challenged the accuracy of these findings of fact by a proper or any specification of error, it cannot now be heard to complain. But, in any event, the finding is clearly supported by evidence that at the time of the purchase Jones knew that the goods had been included in a special offering but that no bids were received for these goods, even from scrap dealers (R. 129); that each joint would have to be taken apart to separate the bronze from the steel before the goods could even be sold for scrap (R. 153); that he didn't know of their purchase price or weight until later (R. 134, 152); that he had previously heard of a number of instances in which goods had been sold by the War Assets Administration for but a fraction of their original cost (R. 126, cf. 167, and Dft. Ex. 13, p. 38). Then too, even the Government had previously refused to place a value on the goods in question (Dft. Ex. 13, p. 32). See also, supra, pp. 7, 8.

As to any claim that Jones was bound by law to take notice of any limitations on the authority of the War Assets Administration or its agents, it is submitted that the provisions of Section 25 of the Act expressly remove any such requirement. As stated in House Report No. 1757, supra, at p. 17, the purpose of this provision was "to assure purchasers that agencies selling property of the Government have full authority to do so * * * ". If, on the other hand, Congress had intended that pur-

chasers from the War Assets Administration were still to assume the risk of discovering any lack of authority to sell and were to be put on constructive notice of any defects in the existence of such authority, there would have been no reason to include Section 25, and to now hold that such was the legislative intent would completely nullify Section 25.

In addition, it is to be noted that Section 25 used the term "bona fide purchaser for value". Congress did not use the term "bona fide purchaser for value *without notice*", as now commonly used, as under the Uniform Sales Act (cf. Section 71-124, O.C.L.A.), but omitted the requirement concerning absence of notice. The fact that the factor of "value" was specifically mentioned in addition to the requirement of "bona fides" makes even clearer the intent to omit any requirement as to "notice". Thus it is clear that Congress used the term as defined by the United States Supreme Court in *United States v. Des Moines Nav. & R. Co.,* 142 U.S. 510, 530, as follows:

> "But the term 'bona fide purchaser' has a well-settled meaning * * * Anyone is a bona fide purchaser who buys in good faith and pays value."

Moreover, as also held in that case (which was a suit by the Government to cancel a patent to land issued to an alleged "speculator") in order to set aside "evidence of title", issued by the Government,

> " * * * the evidence in support must be clear, strong and satisfactory. Muniments of title issued by the Government are not to be lightly destroyed."

It seems clear that the whole purpose of Congress in enacting Section 25 was to go beyond the protection of "bona fide purchasers," if understood in a technical sense, to require total absence of notice, constructive as well as actual. Such purchasers already had full protection, even in the absence of statute. The reference in Section 25 that as to a bona fide purchaser a bill of sale was to be conclusive as evidence that the sale was *in compliance with the Act* further makes it plain that the intent of Congress was to protect against the very contention made in this case, i.e., that the sale was not in compliance with the Act and of the myriad and numberless administrative regulations issued thereunder by the War Assets Administration—whether for non-compliance with some remote regulation, mistake, or for any other reason, so long as the purchaser acted in bona fides and paid value. Therefore, the omission of the requirement "without notice", as used in the Uniform Sales Act, must be deemed to have been deliberate.

For a case bearing quite directly on this question, see *United States v. Winona & St. Peter R. Co.*, 165 U. S. 463, 477 ff., in which the Government attempted to cancel a land patent, charging that the purchaser was not a bona fide purchaser, but was charged with notice of public records showing a mistake, and it was held, under a statute protecting bona fide purchasers, that if the purchaser acted in good faith his title was conclusive under that statute, regardless what constructive notice might be chargeable to him.

Therefore, it follows that if in this case Jones was in good faith when he made the purchase and paid "value", his title is conclusive. As to the requirement of "value", it is clear that the payment of $75.00 was sufficient, since that term is defined in the Uniform Sales Act as "any consideration sufficient to support a simple contract" (see Section 71-176(1), O.C.L.A.). As for the requirement of good faith, we believe that the testimony and evidence, including the admissions of the government agents, as outlined above (pp. 6-10), and as found by the trial judge (R. 34-36), was more than sufficient to establish his complete good faith, even if defendant had that burden, and was far less than sufficient to sustain the burden on the Government to prove his bad faith.

But even if, in order to be a "bona fide purchaser" under this statute, he must have been without notice, which we strenuously deny for the reasons stated above, it was not established and cannot be said that Jones had notice, either actual or constructive, of any lack of authority (of Burgoyne) to make the sale.

Even if it be conceded, which we do not, that Jones was put on constructive notice of Bulletin No. 80 (Plf. Ex. 5), which limited Burgoyne's authority and which was never even published with the countless regulations in the Federal Register, the fact remains that the sale was, to his knowledge, approved by Zannon (see Dft. Ex. 11); that Zannon had ample authority and that the sale was also originally authorized by Williams, who also had ample authority (see supra, pp. 3-5). The

testimony of Zannon that he did not know what he was doing and assumed that the sale was on a bid basis, as marked on the form W. A. A.-2, can be given no consideration, since the Government has contended that none of its agents (including both Zannon and whoever prepared Form W.A.A.-2) were negligent (P.T. Order, Gvt. Br. 51). It must therefore be presumed that Zannon read the sales memorandum and knew that it constituted a sale to Jones of the goods in question for $75.00.

In any event, here the question was not one of lack of authority but of an alleged mistake, made in the exercise of admitted authority. The sale was authorized and approved by agents who had full authority to do so, the only question here involved, and, so far as notice to Jones is concerned, it surely cannot be said that he was put on actual or constructive notice that Zannon didn't know what he was doing when he signed the Form W. A. A.-2, or that any other mistake was made by the government agents not brought to his actual knowledge. Whether there was such mutual or unilateral mistake as to afford a separate ground for avoiding the sale (as discussed below) is an entirely separate matter—the only question here involved being whether the Government has sustained the burden of proving that Jones had actual or constructive notice of lack of their authority. Since, for the foregoing reasons, the Government clearly has not sustained this burden of proof, it follows, under Section 25 of the Surplus Property Act, that the title of Jones to the goods in question is con-

clusive and that the sale cannot be rescinded or set aside for lack of authority.

D. *Sale not Invalid as at an Inadequate Price.*

Appellant next argues that the sale was invalid because at a "grossly inadequate price," contrary to provisions of Section 2 of the Surplus Property Act providing that sales should be at fair prices (Gvt. Br. 18). It should first be noted that Section 2 is but a part of the "declaration of general objectives" of the Act and that there is no express provision that sales made at inequitable prices shall be invalid. It should next be noted that Section 2(r) and Section 2(t) of the Act (50 U.S.C.A. App. Sec. 1611) not only declare as an objective that the Government shall "as nearly as possible" obtain the "fair value" of surplus property, but that surplus property shall be disposed of "as promptly as feasible * * *". These requirements have been interpreted by W. A. A. as follows:

> "All sales of surplus war property, * * * will be made in accordance with the policies, regulations or directions of the Administrator or, with his authority, of the disposal agencies. In the absence of specific directions, * * * sales may be made in such manner as the selling agency shall deem advisable, adhering to *the primary principal that a reasonable test of the market,* having due regard for the nature, condition, quantity and location of the property, *is a necessary prerequisite to any sale.*" (Title 32, Code of Fed. Reg. Ch. XXIII, paragraph VI).

Here it cannot be denied that there was a reasonable test of the market, since Special Offering was even sent

to 4,723 dealers, including scrap metals dealers (Dft. Ex. 9), and it was admitted that the Government had exhausted all efforts to obtain a higher price (Dft. Ex. 14, pp. 24-25). By the same token, and for other reasons set forth below, it was not established by the Government that the price obtained for these goods was not "as nearly as possible" the "fair value" of the surplus property involved. Moreover, the trial judge specifically found as a fact that "a reasonable test of the market had been made" (R. 34). This Court should take judicial notice of the fact that, by virtue of the necessities of the gigantic disposal problem faced by the Government, war surplus goods were often sold at but a fraction of their original cost, as was both contended and admitted in this case (R. 126, 167, Dft. Ex. 13, p. 38). Therefore, it is highly improper to compare such a sale with private sales made under ordinary circumstances, as the Government would now adopt as a standard.

This is not a case such as *Hume v. United States,* 132 U. S. 406, as cited by the Government (Gvt. Br. p. 18). In that case there was both an obvious mistake by the government agents plus a finding of fact that the actual market value was but a fraction of the amount sued for. Nor is this a case in which it is established by the record that a sale was made at a price below the fair market value or less than a reasonable price. Here, on the other hand, the trial judge has specifically held that there was no mistake by either party (R. 35); there is no finding as to the actual market value of the goods, but, on the other hand, a finding that the value was "questionable and speculative", as recognized by both parties (R. 35).

At the risk of reiteration, it must be constantly borne in mind that in this case the goods in question had been offered for bids to 4,723 dealers, including dealers in hardware, equipment and scrap metals, without receiving a single bid (Dft. Ex. 9). In order to sell the goods even for scrap, at the price of $2,260.00, quoted by government witnesses, it would first have been necessary to incure the labor cost of taking apart each of over 40,000 gear joints to separate the bronze from the steel (R. 94, 95, 153). While it is true that Jones had later placed a high value on the goods in connection with his action for replevin, he declined to place any value on the goods even in that case until forced to do so by the Government (see Dft. Ex. 12, original Complaint), and in that case the Government denied that the goods had any value (Id. Gvt. Answer ; see also Plf. Ex. 13, p. 32). It is also now admitted by the Government that it "did not offer any evidence as to the market value of the Universal gear joints" (Gvt. Br. 19).

Thus the Government has not satisfied the burden of proof to establish its contention that the price was grossly inadequate or unreasonable, and the findings of fact by the trial court, which are not challenged by any specification of error, are directly to the contrary.

Finally, the Government does not complain of the price received for the other items sold to Jones (R 161), including a dump truck body for $.06, costing $50.00, and two jeep motors at $.28 each, costing $257.70, together with other items similarly priced, all as set forth in Plf. Ex. 3. It must therefore be assumed that

the Government does not regard the sale of such items as invalid because of the price obtained. There is considerable evidence in this case that the Government often sold war surplus goods at but a small fraction of their original cost, particularly where, as here, no bids had been received, and that no such sale had ever been set aside, even though questioned (R. 136, 167; Dft. Ex. 13, pp. 36-39). Therefore, to hold, as the Government contends, that this sale should be set aside for inadequacy in price alone, would not only be wholly inconsistent with the conduct of the Government in other instances, but would place in jeopardy the titles in thousands of sales of surplus war commodities subject to the whim of some Government agent or attorney based upon some audit or investigation in the indefinite future.

That such was not the intent of Congress in adopting the Surplus Property Act is again made clear by reference to Section 25, which protects bona fide purchasers not only against claims that a sale was not in compliance with the Act by reason of technical excess of authority by government agents, but also against the present contention that a sale was not in compliance with the Act by reason of inadequacy of price.

II. NO MATERIAL MISTAKE WAS MADE BY GOVERNMENT AGENTS.

Appellant next argues that the sale should be rescinded because of the alleged failure of the government to know the nature or value of the Universal gear joints (Gvt. Br. 20-23).

Here again, appellant's specifications of error will be searched in vain for any specification raising the issue of alleged mistake, either directly or as a reason in support of any specification, as required by Rule 20. Even specification 5, which complains that the trial court erred in holding that plaintiff was not entitled to rescind the sale completely, fails to do so. Therefore, the claim of alleged mistake should not be considered by this Court for lack of a proper or any specification of error. If, however, this Court desires to consider the merits of this issue, and without waiving this point, appellee submits the following arguments on the merits.

A. *Findings of Fact that no Mistake are Conclusive.*

The following findings of fact were made by the trial judge on the question of mistake:

> "Defendant was shown by said War Assets Administration a complete and accurate description of all of the items of said residue. Both plaintiff, its agents and defendant were familiar with the nature of said items. There is no substantial evidence to establish the value of said items at the time of said sale other than that the value of said items, and in particular of said universal gear joints, was substantial, but that the exact value of said goods was questionable and speculative, which said facts were recognized both by plaintiff, its agents and defendant and all of said negotiations, including the determination of said price and their subsequent sale, were the deliberate and intentional acts of plaintiff, its agents, and defendant, and the means of information as to the value of said goods were open alike to all of said parties.
>
> "No mistake was made by either plaintiff, its agents, or defendant as to the identity, nature or

> value of said items, including said gear joints, nor was there any mistake that determined the conduct of either plaintiff, its agents, or defendant, nor did defendant have any knowledge or reason to know that plaintiff or its agents made any such mistake or lacked authority to make said sales." (R. 34-35).

Since, as noted above (p. 19), there is no specification of error whatever which challenges the findings of fact made by the trial judge, the above quoted finding that there was no mistake must be accepted as conclusive on this question.

B. *Grounds for Rescission Insufficient under Oregon Law.*

Since the contract in this case was made in Oregon, the law of Oregon is controlling. As held by the Oregon Supreme Court in *Leonard v. Howard,* 67 Or. 203-212:

> "We are not aware of any rule of law or morals that requires a person soliciting bids for services to performed to warn the bidder that his bid is so low that he may lose money by complying with its terms."

See also *Winklebleck v. Portland,* 147 Or. 226, 242, applying a similar rule to mistakes by government agencies. As further held in *Manley v. Smith,* 88 Or. 176, 190:

> "* * * when parties have reduced their covenants to *writing* it must be held to contain all the terms in the absence of *fraud or mutuality of mistake.*"

Even courts holding that unilateral mistake may be sufficient to set aside a contract, hold also that if there

has been any negligence by the plaintiff he cannot rescind (*9 Am. Jur.* 378, 379).

This rule has not only been applied in Oregon in the *Leonard* case, supra, but also by the Supreme Court of the United States in *Grymes v. Sanders,* 93 U. S. 55, at 61, in which it was held that

> "Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence 'which may be fairly expected from a reasonable person'."

In this case the only mistake urged on appeal is unilateral, i.e., on the part of the Government. It is also conceded that the terms of the sale were reduced to writing, which described the goods and their price and warranted title (Dft. Ex. 11). Thus the only grounds on which the sale can be set aside, under Oregon law, are for fraud or mutuality of mistake, neither of which was established at the time of trial nor is urged on this appeal.

Moreover, even on a theory of unilateral mistake, the Government is barred by its own negligence in failing to read the written documents describing the goods and stating their original cost (R. 83, 92, 232-233; see also Plf. Ex. 1, 3 and 4 and Dft. Ex. 9 and 11). On the other hand, if the Government should deny negligence (Gvt. Br. 51), then it would follow that its agents must be presumed to have been familiar with this information, in which event they could have made no mistake in selling

the goods to Jones at the terms specified in the sales documents (Dft. Ex. 11).

C. *Any Alleged Mistake was not Material.*

The Government correctly states the proposition that in order to set aside a contract for alleged mistake "the mistake itself must be so important that it determines the conduct of a mistaken party or parties" (Gvt. Br. p. 21). In this case the only mistake claimed by the Government is that its agents were mistaken as to the nature and value of the goods for the reason that they thought that the gear joints were automotive equipment and not marine equipment.

But the Chief of the Automotive and Machinery Division of W. A. A., under whose direction the special offering was prepared and sent out and who personally made the sale to Jones (R. 80, 90), testified on deposition that even if the gear joints had been automotive equipment they would have had considerable scrap value (R. 94, 202); that even if he had realized that the gear joints were marine equipment and not automotive equipment it would not have changed the program for the sale of these goods and that "there is nothing that we could have done to offer them in any other way * * * except just taking a chance by reprogramming them like we did. We reprogrammed them and tried to get bids again" (R. 205). It must also be recalled again that the special offering for these goods was sent to 4,723 dealers, including dealers in hardware, equipment and scrap metals, but was *not* sent to automotive parts dealers (Dft. Ex. 9. See also, supra, pp. 2-5.)

Therefore, even if the findings on lack of mistake are open to question in this case, which appellee denies, it is clear from the evidence that any such mistake was not responsible for the failure to receive bids from other dealers and did not determine the conduct of the Government.

D. *Jones had no Knowledge or Reason to know of Mistake.*

The Government next contends that the sale should be rescinded for the reason that Jones knew or had reason to know that the government agents made a mistake as to the nature and value of the goods because there was an obvious disparity between the value of the goods and the price paid for them (Gvt. Br. 21-23). Here again the trial court made findings unchallenged by specifications of error which completely foreclose this argument (R. 35). But even if these findings are open to question, which appellee denies, it is again clear from the evidence that the findings are supported by the evidence and that this was not a case of "obvious error", such as the actual recognition of a valuable jewel placed by mistake for sale with dime store jewelry or the making of an obvious error in a quotation of the price of lumber.

The evidence is uncontradicted that before the sale Jones had heard that the War Assets Administration on a number of instances had sold goods at a very small fraction of the original cost to the Government (R. 126); that he was told that the special offering had been sent out, even to scrap dealers, but that no bids were re-

ceived (R. 129); that he was shown by War Assets Administration sales agents a description of the goods which was admittedly complete and accurate, and thus knew that they were acting on the basis of such information (R. 129; see also R. 92, 221 and P. T. Order, Gvt. Br. 45, 46); that at the time of the sale he didn't know the original cost of the goods to the Government or the weight of the goods (R. 134, 152); that he knew that the goods cost more then he paid for them, but didn't know whether he could sell them and that to sell them for junk each joint would first have to be taken apart to separate the bronze from the steel (R. 129, 153, 94, 95).

Therefore, under this evidence, there is no reason for the Government's contention that Jones knew or had reason to know that the Government had made a mistake. See also, supra, pp. 6-10.

E. *Price was Result of Deliberate Act by W. A. A. with Full Information as to Nature and Value of Goods.*

Finally, it is contended by the Government on the issue of mistake that Jones had the burden of proof to establish that the price was the result of a deliberate and intentional act by the parties (Gvt. Br. 22). Without conceding this contention, it should again be noted that the trial court specifically found that all of the negotiations for the sale, including the determination of the price, were the "deliberate and intentional acts of plaintiff, its agents, and defendant", and that "the means of information as to the value of said goods were open alike to all of said parties" (R. 35).

These findings were not only unchallenged by any specification of error but were also not among the findings elsewhere challenged in appellant's brief (Gvt. Br. 31-34). Thus they cannot now be questioned. Moreover, one who deliberately and intentionally enters into a contract and determines a price for the sale of goods, with full information as to value before him, cannot be said to have made any mistake at all as to the nature and value of the goods sold. Thus this finding is conclusive of the entire question of alleged mistake, regardless of the other arguments and grounds urged herein.

But even if these findings are open to question, which appellee emphatically denies, it is clear from the evidence that the findings are supported from the evidence. There is no contention that Jones made any mistake as to the nature and value of the goods. It is, however, contended that the Government was not negligent in the transactions leading to the sale (P. T. Order, Gvt. Br. p. 51). Thus it must be presumed that the government agents read and were familiar with such information as was available to them.

It is admitted that the government agents had in their possession full and complete information as to the nature and value of the goods in question, including their original cost (Plf. Ex. 2, 3 and 4), which was apparently completely understood, as evidenced by their preparation of a Special Offering, which admittedly included a "full and complete description" of the goods (P. T. Order, Gvt. Br. 45); that a reading of this description would put a person on notice of the value of the goods

involved (R. 92, 206); that all attempts to secure bids on these goods were unsuccessful, although they were offered for bids to 4,723 dealers, including dealers in scrap metals (Gvt. Br. 45; see also Dft. Ex. 9); that all attempts to sell the goods had been exhausted and that the government sales program would not have been changed even if the W.A.A. agents knew that the gear joints were not automotive equipment (R. 205). There is also evidence in the record that the goods had first been offered for $900.00 or $1,000.00 and later for $250.00 before being offered for sale at $75.00 (R. 127); that where, as here, goods were offered for bid and no bids were received, they were often put up for sale at the best price offered and often sold for but a fraction of their original cost and that this sale was in accord with the W. A. A. custom and practice (R. 167; Plf. Ex. 13, p. 38; R. 89).

Therefore, even if defendant had the burden to establish that the sale was the result of a deliberate and intentional act by the Government, which appellee denies (*36 Am. Jr.* p. 456), that burden has been fully satisfied by the proof, and the findings of fact by the trial judge are fully supported by evidence and are not "clearly erroneous". As stated in *46 Am. Jur.* p. 265, it is established law that

> "A mistake relating merely to the attributes, quality or value of the subject of a sale * * * is not sufficient to authorize a court to rescind the contract of sale at the suit of the aggrieved party, where the means of information were open alike to both parties and there was no concealment of facts or imposition."

As further held in *United States v. Standard Rice Co.*, 323 U. S. 106, 111:

> "Although there will be exceptions, in general the United States as a contractor must be treated as other contractors in analogous situations * * *. We will treat it like any other contractor and not revise the contract which it draws on the grounds that a more prudent one might have been drawn."

III. DECISION PROPER WITHOUT FURTHER DECLARATORY RELIEF.

The amended complaint by the Government contained the following prayer:

> "Wherefore, Plaintiff prays; (1) that a decree be rendered declaring the *purported sale* to be void and Plaintiff to be the owner of the aforementioned property purported to have been sold to the Defendant. (2) That a Decree be rendered to vacate, set aside, and rescind the aforementioned purported sale. (3) For a declaration of the rights and duties of the party hereto under and by virtue of any agreement arising under the aforementioned transactions between the Plaintiff's agents or agents and the Defendant. (4) For such other relief * * * ". (R. 27).

The original complaint asked only that the sale be "vacated, set aside and rescinded", with no request for declaratory relief (R. 6). The plaintiff's requested relief in the proposed pre-trial order (which was not signed and is not a part of the record) is similar to the amended complaint, with the addition of a prayer relating to tender and status quo (Gvt. Br. 52).

The trial court concluded as a matter of law that "Plaintiff is not entitled to rescind said sale or to the other relief prayed for by plaintiff herein, and the action shall be dismissed for want of equity" (R. 37-38). It should also be noted, however, that the trial court found as a fact that there was no mistake, thereby rejecting the Government's claim on that basic issue, and that defendant was a bona fide purchaser for value to whom a bill of sale had been executed and delivered by and on behalf of the W. A. A. purporting to transfer title to the goods purchased, thereby satisfying the requirements of Section 25 of the Surplus Property Act and rejecting the government claim that the sale was void for lack of authority (R. 34-36).

The Government has now sought to amend its brief by adding the following specification of error:

> "7. In holding and concluding that the plaintiff was not entitled to a decree declaring the rights and duties of the defendant and the plaintiff under and by virtue of any agreement arising under transactions between defendant and plaintiff's agent or agents." (Gvt. Br. between 16 and 17).

Without waiving the contention that the foregoing was not a proper specification of error in not stating wherein the foregoing findings and conclusions were alleged to be erroneous, as required by Rule 20, defendant submits that the decision of the trial court was entirely proper without granting any further declaratory relief.

A. *Findings, Conclusions and Judgment sufficiently declared Rights and Duties of Parties, settled the Issues in Dispute, and terminated the Controversy.*

The Government in its brief states that the remedy of the Declaratory Judgments Act is appropriate "where a public authority seeks a declaration that the contract entered into by it was void or voidable" (p. 24). But in this case the Government did not ask for any such declaration, but only "for a declaration of the rights and duties" of the parties under the agreement (R. 27).

It is obvious from the pleadings in this case that the primary "right and duty" which the Government desired to have decided in this case was whether it had the right to rescind the sales in question. This was emphatically decided by the trial judge in holding that the Government "is not entitled to rescind said sale". Not only did the trial court so hold, but, by the findings set forth above, also resolved decisively the two basic contentions advanced by the Government: (1) That of mistake, and (2) that of lack of authority. (See R. 20-26; Gvt. Br. 48-53). As stated in *Anderson, on Declaratory Judgments,* p. 534:

> " * * * The power of the Court to grant relief in such proceedings is dependent upon and circumscribed by the pleadings formulating the issues therein. * * * There is no right to an adjudication regarding matters about which there is no issue or contention."

It is therefore submitted that, while perhaps not in the strict form of a declaratory judgment, the decision by the trial court did substantially declare the rights of

the parties as to the only basic issues raised by the pleadings and, as such, is not subject to reversal upon the ground set forth by this specification of error.

To have gone further and to reiterate these same conclusions in the form of a declaratory judgment would have "served no useful purpose in clarifying and settling the issues of the case," which had already been well settled by the decision, as explained above. Nor would such a form of judgment have added anything to "terminate the controversy", to paraphrase *Borchard on Declaratory Judgments* (2nd Ed.) p. 299. In other words, such an addition to the findings, conclusions and judgment of the Court would have been "superfluous" and would not have "served any useful purpose", and, therefore, was properly refused. (*Borchard,* supra, pp. 306, 307).

Finally, it is settled law that a declaratory judgment may be denied where another case is pending between the same parties on the same issues. *Anderson,* supra, p. 529. If this is true, then it should follow, a fortiorari, that where, as here, the complaint in the *same case* requests direct relief on the same issues, a further or alternative prayer for declaratory relief is properly denied. Here the Government asked that the sale be held to be void and be vacated, set aside and rescinded (R. 27). These prayers involved the same issues of mistake and lack of authority as the further prayer for a declaration of the rights and duties of the parties under the agreement of sale. Therefore, since the trial court directly decided the prayers for direct relief by holding

that the Government had no right to rescind the sale, it follows that there was no error in not granting a further declaratory judgment on the same issues.

B. *Granting or Denial of Declaratory Judgment is Discretionary.*

That the granting or denial of a declaratory judgment is a matter within the discretion of the trial judge has been established in many cases. Thus, it was held by the Supreme Court of the United States in *Alabama State Federation of Labor v. McAdory,* 325 U. S. 450, 462 that

> "The declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered."

Again, it was held in *Brillhart v. Excess Ins. Co. of America,* 316 U. S. 491, 494, that although a Federal District Court has jurisdiction to enter a declaratory judgment, "it was under no compulsion to exercise that jurisdiction".

Finally, in *Eccles v. Peoples Bank,* 92 L. Ed. Adv. Sh. 592, 596, the most recent and authoritative expression on this point, it was held that

> "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. * * * It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental ac-

tion is involved, courts should not interfere unless the need for equitable relief is clear, not remote or speculative."

The above quoted decisions are all of later date and therefore must be taken as superseding the decision quoted in the Government brief (p. 24).

This same principle has been recognized by this Court in *Lumbermans Mut. Casualty Co. v. McIver,* 27 F. Supp. 702, 706; aff. 110 F. (2d) 323 (C.C.A. 9th); cert. den. 311 U. S. 655. See also *Maryland Casualty Co. v. Boyle Const. Co.* (C. C. A. 4th), 123 F. (2d) 558.

It is therefore submitted that the decision of the trial judge was entirely without error on this issue. The findings, conclusions and judgment in this case were sufficient to declare the rights of the parties under the agreement and also to settle the issues in dispute and terminate the controversy as a practical matter. A further declaratory judgment of the rights and duties of the parties would have been not only superfluous and would have served no useful purpose, but it was also within the discretion of the trial judge in this case, particularly under the circumstances set forth above, to grant or deny any declaratory judgment whatever.

IV. DISMISSAL FOR WANT OF EQUITY PROPER.

Appellant, by specification 3, complains that the trial court erred in dismissing the case for want of equity. Here again, the specification does not comply with the requirement of Rule 20, in that it merely states an ab-

stract proposition of law and does not state wherein or for what reasons the dismissal was in error. This entire case constituted a suit in equity and this specification thus attempts to go to the entire basis of the decision. Cf. *United States v. Cushman* (C.C.A. 9th), 136 F. (2d) 815; cert. den. 320 U. S. 786. Therefore, if there was no mistake by the parties and if the sale was either authorized by the W. A. A. or protected under Section 25 of the Surplus Property Act, for the reasons stated above, then the equitable grounds necessary for relief did not exist and the Court was entirely correct in dismissing the case for want of equity. If, however, this Court should desire to consider argument on the merits of the particular points raised by the Government's brief under this specification, and without waiving the above contention, appellee submits the following argument:

A. *Equity will not Partially Rescind a Non-Severable Contract after Partial Execution.*

It is established law in Oregon, which controls the contract in this case, that equity will not grant a partial rescission of a non-severable contract and that a party cannot affirm a contract in part and at the same time seek to repudiate it in part, thereby accepting its benefits on one hand while shirking its disadvantages on the other. *Mascall v. Erickson,* 131 Or. 509, 515, citing *13 C. J. 623.* In addition, but as a separate proposition, it is established that a party who has partially executed a contract is barred from rescission. *9 Am. Jur.* p. 389. Therefore, the question in this case is not solely whether

partial performance was made by the Government, as suggested in the Government's brief (pp. 25-27), but also whether only partial rescission has actually been sought by the Government.

As stated earlier in this brief (pp. 35 to 36), the legality of the sale of all items other than the gear joints has been admitted and never questioned and were delivered to defendant (R. 161, 133); the original complaint requested a rescission only as to the gear joints (R. 2-6); even the amended complaint, filed over a year after the sale and less than three weeks before trial, only asked to rescind the sale as to Lots Nos. 27, 28, 29 and 30, consisting of the gear joints (R. 24); the Government has admitted that it has at all times retained the benefit of payment for all of the numerous other items involved in the sale (Gvt. Br. 47-48), with no attempt to regain possession of them or to tender back payment for them (R. 152). Only by bare contention in the unsigned pre-trial order, not properly a part of the record, did the Government attempt even nominally to effect an actual rescission of the entire sale. Thus it is clear, at least as a practical matter, that the Government has sought only a partial rescission of contract, while at the same time enjoying the benefits of the balance of the contract. Under the law of Oregon this is not possible.

The fact that the plaintiff in this case is the Government itself and that the Government is not ordinarily bound by the unauthorized acts of its agents, as next contended in the Government's brief (pp. 26-27), begs

the entire question of whether the sale was properly authorized in this case, as well as the effect of Section 25 of the Surplus Property Act in protecting Jones as a bona fide purchaser. But even assuming that the original sale and delivery was not authorized, it is an established rule of law that once the Government comes into court its conduct thereafter is to be considered by the same standard as any other litigant. *First National Bank v. United States,* 2 F. Supp. 107. Therefore, since when the Government first filed its complaint in this case it asked only for a partial rescission of the sale, and continued in that position until shortly before trial, and continued at all times to retain the benefits from the balance of the contract, the Government is now barred from the right to rescind the contract the same as a private party would be under similar circumstances. Likewise, the position of the Government is not aided by its hasty gestures shortly before trial and over a year after the sale, such as the filing of its amended complaint and its offer in the unsigned pre-trial order to either tender back the entire purchase price or allow defendant to retain all items except the gear joints in dispute and be charged with their value. See also *Railway Company v. McCarthy,* 96 U. S. 258, 267.

B. *Failure of Tender and Delay in Rescission Proper Factors for Consideration.*

The government waited nearly eleven months from discovery of the alleged mistake to tender even part of the purchase price and to file suit for even partial rescission. It waited over one year to ask for complete

rescission and has never tendered the balance of the purchase price. As held in *Rayburn v. Norton,* 117 Or. 328, 336:

> "In pursuit of this remedy of so-called rescission by one of the parties, it is incumbent upon the plaintiff to act promptly and without delay and to surrender to the offending party *all* that the former has received under the contract, so far as it can possibly be done. As said in 2 Black on Rescission & Cancellation, Section 616, speaking on this subject:
>
> "' . . . It is a rule founded on natural justice, and requires that the offer shall be made by the purchaser to his vendor upon the *discovery of the defects for which the rescission is asked.*' "

Here the government did not even offer to do equity in its complaint in this case, as now recognized by the government to be a prerequisite to relief (Gov. Br. p. 27) and made no attempt to do so until the pre-trial order not signed by the Court and not a part of the record in this case. But regardless of what the text-writers cited in the government brief (pp. 27-28) may conceive to be the law, the above quotation represents the law of Oregon which controls the contract in this case. This salutary rule of law should likewise be applied to the government in its contracts made in Oregon, at least when contracting with private parties or when acting in a proprietary capacity, as in this case, and at least as a standard of conduct after the government has voluntarily subjected itself to the jurisdiction of a court of equity.

But even if the failure of tender and delay in rescission are not controlling factors in denial of rescission in

this case, it is submitted that they could be properly considered, along with the other facts of the case, by the Court in determining the equities of the case and whether, as a matter of equity, the relief prayed for by the government should be granted or denied.

C. *Movement of Goods Outside State Also Proper Factor for Consideration.*

The government is now so bold as to deny that there is any evidence other than pleadings to establish that its agents moved the gear joints out of the state in an attempt to deprive Jones of any effective legal remedy and states that, in any event, the government is not bound by such conduct. (Gvt. Br. 28-29).

But it is established not only by the government's answer in the replevin proceedings (Dft. Ex. 12), but by the shipping memoranda and notice (Dft. Ex. 16 and 17) as well as by admission of the government (Gvt. Br. 51) that when Jones attempted to exercise his legal rights in an attempt to secure the delivery of the goods by filing an action for replevin in the state court, the W. A. A. deliberately moved the goods twice in an attempt to place the goods in another state, outside the jurisdiction of th Court. (See also Dft. Ex. 13, Test. of Buffet) Later the government attempted to defend this action by arguing that Jones still had a remedy for damages (Gvt. Br. 51), but the law of replevin is well established in Oregon in *McIntosh v. Buffington,* 108 Or. 358, 366, as follows:

> "If the property recovered has been *lost or destroyed* or if it is *impossible* for any reason to ob-

> tain a return of the property recovered, then the judgment will be satisfied by a money payment of the value of the property recovered, but *it is only in such a case that . . . the losing party . . . is entitled to have judgment satisfied upon payment of such value.*"

Thus, it is clear that after attempting to deprive Jones of any legal remedy to seek the return of the goods themselves, and, indeed, of any effective remedy at all, since the value of the goods was admittedly speculative, the government does not come into this Court with "clean hands".

It is not a question of whether the government is absolutely bound or estopped by this conduct of its agents, as denied by the government brief. (p. 29) The question, rather, is whether the rules that one seeking equity must have "clean hands" or not be "in pari delicto" are applicable in such a case. At least the removal of the goods was one of the factors which could properly be considered by the Court in a suit of equity, such as this, in determining whether the equities were such as to justify the relief prayed for by the plaintiff.

D. *Other Factors Also Present Which Justified Denial of Relief.*

It must also be remembered again that the facts of partial rescission and partial execution, failure of tender and delay in rescission, and movement of the goods outside the state were not the only equitable facts upon which the Court was entitled to base its conclusion that the complaint should be dismissed for want of equity,

nor upon which the judgment in this case can be sustained. Nor is there anything to indicate that these were the sole and only factors considered by the trial judge in deciding this case.

Other equitable factors in this case include the fact that any loss to the government was the result of its own negligence, since it had before it all of the necessary information as to original cost and the nature and value of the goods upon which to fix a proper sales price (9 Am. Jur. p. 391). Another factor of at least equitable consideration is the fact that W.A.A. had made sales of other goods at but a small fraction of their original cost and, indeed, that such was the custom and practice where, as here, goods were offered for bids and no bids were received, (R. 167) and that although the facts of such sales had been called to the attention of W. A. A. officials, none had ever been disapproved or rescinded, at least after sales documents had been issued. (Dfts. Ex. 13, p. 38, 39. See also R. 159)

Finally, it is to be noted that the conclusions of law not only stated that "the action shall be dismissed for want of equity", but *also,* and in the conjunctive, that "Plaintiff is not entitled to rescind said sale or to the other relief prayed for by plaintiff herein." (R. 37-38) Therefore, if the Court correctly considered any of the equitable factors as sufficient grounds for denial of relief the judgment may be sustained. But it also follows that even if the Court was mistaken as to such equitable factors, the decision in this case should still be sustained based upon the separate conclusion that plain-

tiff was "not entitled to rescind the sale or to the other relief prayed for" if the Court was correct in its findings of fact that there was no mistake; that the sale was properly authorized or that Jones was a bona fide purchaser to whom a bill of sale purporting to transfer title was delivered, according to the provisions of Section 25 of the Surplus Property Act.

V. FINDINGS AND CONCLUSIONS NOT INADEQUATE.

The government next argues (1) that the findings of fact and conclusions of law do not resolve the issues raised by the pleadings and pre-trial order; (2) that they do not show the basis for the decision, and (3) that the findings of fact do not support the conclusions of law. (Gvt. Br. 29) While this argument is based upon purported specification of error, these specifications again do not satisfy the requirements of Rule 20 in that they do not state "as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous" nor do they direct attention to the specific findings and conclusions complained of. In the event, however, that this Court should desire argument on these specifications and without waiving the point, appellee submits the following:

A. *Findings and Conclusions Furnished Sufficient Basis for Decision.*

As stated by the government, the basic test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case

so as to provide the basis for purposes of decision. (Gvt. Br. 30) But it does not follow that the trial court must make findings and conclusions on each and every issue of fact and law that may be involved in a case. As held in *Schilling v. Schwitzer Cummins Co.,* 142 F. (2d) 82, 84, a case relied on in the government brief (p. 30):

> "While counsel may feel disappointed that findings do not discuss propositions sincerely contended for, that, alone, does not make them inadequate or suggest that such propositions were not understood by the court.
>
> * * *
>
> "Certainly, we should not require or encourage trial judges, in preparing findings, to assert the negative of each rejected contention as well as the affirmative of those which they find to be correct."

As also held in *Kleinkiewicz v. Westminster Deposit & Trust Co.,* 122 F. (2d) 957, citing *McGee v. Nee,* 113 F.(2d) 543:

> "The trial court is not required to make findings on all the facts presented and need only find such ultimate facts as are necessary to reach the decision in the case."

See also *Ladd v. Brickley,* 158 F. (2d) 212, 221.

Therefore, the government may not complain that the trial court made no direct finding that the sale was valid or as to declaratory relief. Moreover, these matters did not involve findings of fact, so as to come within the test of sufficiency, stated in the government brief (p. 30), but were at the most subject to possible conclusions of law. It has already been pointed out that not

only is the entire effect of the decision by the trial court to sustain the validity of the sale, but that the court made repeated and direct references in its findings to the "sale", without any qualification as necessary to intimate invalidity. (Supra, 19.) It has also been pointed out why there was no error in refusing declaratory relief (Supra, 45) and why the findings and conclusions are sufficient to support the decision in this case (Supra, 58).

Moreover, as held in *Sonken-Galamba Corp. v. Atchison T & S. F. Ry. Co.,* 34 F. Supp. 15; aff. 124 F. (2d) 952, cert. den. 315 U. S. 822:

> "It would seem that if a party is not willing to give a trial judge the benefit of suggested findings and conclusions, he is not in the best of positions to complain that the findings made and conclusions stated are incomplete."

See also *Rokey v. Day & Zimmerman,* 157 F. (2d) 735.

But the final answer to this contention by the government is again contained in one of its own cases, that of *Shapiro v. Rubens,* 166 F. (2d) 659, 667, which affirmed findings and conclusions by a lower court despite objections on similar grounds to those here contended, in the following language:

> "The failure to find the ultimate fact is deemed a finding against the party having the burden of proof . . . and on appeal, all facts not embraced in special findings will be regarded as not proved by the party having the burden of the issue. The failure to find a fact essential to recovery is equivalent

> to a finding against the party having the burden to prove the same."

See also *Container Patents Corp. v. Stant,* 143 F. (2d) 170, and *Walling v. Plymouth Mfg. Corp.,* 139 F. (2) 178, 180.

Therefore, all that can be concluded from the failure to make an express finding or conclusion that the contract was void, as contended by the government, which had the burden of establishing such invalidity, was that such failure is equivalent to a finding that the contract was not void, but was a valid contract.

B. *Any Defects in Findings and Conclusions Not Reversible Error.*

It is well established that a case should not be reversed for failure to make proper conclusions of law where "no useful purpose would be served by remitting the case for a more formal statement of the district judges conclusions of law." *Green Valley Creamery v. United States,* 108 F. (2d) 342. Thus, as held in *Hurwitz v. Hurwitz,* 136 F. (2d) 796, 799:

> ". . . such findings are not jurisdictional requirements of appeal which this court may not waive. Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case. That is the situation here."

Again, in *Goodacre v. Panagopaulos* et al., 110 F. (2d) 716, the same rule was stated as follows:

"The District Court evidently failed to comply with the requirement of Rule 52(a) that it 'find the facts specially and state separately its conclusions of law thereon.' It does not follow that we must reverse the judgment. Like its predecessor, Equity Rule 70½, Rule 52(a) 'is intended to aid the appellate courts by affording them a clear understanding of the basis of the decision below.' We have held that, when this clear understanding is afforded, the judgment may stand although the rule is violated."

VI. FINDINGS OF FACT CONCLUSIVE AND NOT "CLEARLY ERRONEOUS."

Finally, the government complains in its brief (pp. 31-34) as to various findings of fact made by the trial judge. But the government did not include any attack upon these findings in the statement of the points on which it intended to rely on appeal. (R. 40, 241) Of far greater importance, the government has assigned no specifications of error whatever complaining of these or any other findings of fact by the trial judge. (Gvt. Br. 16, insert) It is therefore submitted that these findings of fact are conclusive and binding upon the government and that it cannot now complain as to such findings. As this Court has held many times, any such error will be deemed to have been abandoned on appeal in the absence of proper specifications of error. *Hultman v. Tevis,* 82 F. (2d) 940; *Steinberger v. United States,* 81 F. (2d) 1008. See also *Humphreys Gold Corp v. Lewis,* 90 F.(2d) 896; *Commissioner of Internal Revenue v. O'Donnell,* 90 F.(2d) 907; *Cyclopedia of Federal Procedure,* supra, vol. 12, pp. 17-19.

But even if this Court desires to consider whether the findings of fact in question are properly supported by evidence, and without waiving the above contention, it is submitted that all of the findings in question are supported by sufficient evidence and, at least, are not "clearly erroneous."

The finding that W. A. A. issued directives that the residue be placed on sale at the best price offered is directly supported by evidence that the sale was authorized by Williams; that he had necessary authority to do so and from the testimony that he authorized the sale at the best price obtainable it is at least a proper, if not necessary, inference that the best price offered was the best price obtainable. (See also supra, pp. 3, 20.) Moreover, there was also testimony that he put up the residue for sale at the best offer. (R. 119, 215, 216, 235)

The finding that a reasonable test of the market had been made is directly supported by evidence that W. A. A. included the goods in question in a special offering which admittedly contained a complete and accurate description of the goods and was sent to 4,723 dealers, including scrap metal dealers, without receiving a single bid and that the residue was later offered for sale at $1000 and later for $250 and held for several days further without any offers whatever. (See also Supra, pp. 2, 3.)

The finding that the value of the goods was questionable and speculative is supported by the same evidence and also by evidence that it would be necessary to take each joint apart to separate the bronze from the steel

before they could even be sold for junk and that even government witnesses refused to commit themselves as to the value of the goods. (See also supra, pp. 7, 8.)

The finding that government agents made no material mistake has been fully discussed above and is clearly supported by the evidence. (See supra, pp. 2-5.)

The finding that Jones had no reason to know of any alleged lack of authority has also been fully discussed above. (Supra, pp. 6-10) Indeed, the only claimed notice is that based on the common law theory that persons dealing with a government agent are put on notice as to the extent of their authority, a concept having no application to the facts of this case, particularly in view of section 25 of the Surplus Property Act, as pointed out above. (Supra, pp. 28-32.)

But even if all of the above findings were erroneous, which appellee strongly denies, it is nevertheless submitted that the remaining and unchallenged findings are more than sufficient to sustain the decision in this case. Not only are the findings with respect to equitable considerations unchallenged and sufficient as the basis for denial of relief; but, of more importance, the findings that Jones acted in complete good faith, without notice of any mistake or lack of authority and paid value for his purchase, thus being a "bona fide purchaser for value" and that he received a bill of sale executed by or on behalf of W. A. A. and which purported to transfer title to the goods in question, thus completely satisfying the provisions of Section 25 of the Surplus Property Act, are not challenged in any way, either by

specification of error or by argument, except for the argument that, despite the terms of section 25, Jones still had constructive notice of lack of authority. But, as demonstrated above, (supra, pp. 28-32) such an argument cannot be made under the facts of this case and would completely nullify the clear and express provisions of section 25, by which Congress stated its intent to give complete protection to purchasers in good faith for value who received from W.A.A. documents purporting to transfer title from any and all claims by the government that such sales had not been made in compliance with the provisions of the Surplus Property Act.

Respectfully submitted,

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APPENDIX A

Office of the Clerk
U. S. Court of Appeals
For the Ninth Circuit
San Francisco 1, Calif. November 4, 1948

Henry L. Hess, Esq.
U. S. Attorney,
506 U. S. Court House,
Portland, Oregon

No. 11963
U.S.A. vs. Herbert A. Jones, Jr.

Dear Mr. Hess:

In examining the copies of Brief for Appellant in above cause it is noted that your brief does not contain a specification relied upon as required by Subdivision 2 (d) of Rule 20.

Will you kindly have printed inserts for placing in your brief and serve copies upon all counsel promptly.

Sincerely,

PAUL P. O'BRIEN, *Clerk.*

O'B:C
cc-all counsel.